STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2003
v	No. 232897 Wayne Circuit Court
KEITH PORTER, Defendant-Appellant.	LC No. 00-002621

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive terms of life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of killing Darryl Montgomery, who was shot three times, once in the thigh, the face, and the back of his head. The shooting took place in the upper flat of a house out of which the victim sold drugs. At trial, defendant claimed that he accidentally shot the victim in the thigh while defending himself against another person, Steven McBride, who was trying to evict defendant from the upper flat at the victim's request. Defendant claimed that another person known as "Chunky" then used the same gun to shoot the victim in the head.

I

On appeal, defendant first argues that the trial court erred by not sua sponte instructing the jury that he did not have the burden of proving that he acted in self-defense and that the burden was on the prosecutor to prove beyond a reasonable doubt that defendant did not act in self-defense.[1] Generally, jury instructions are reviewed in their entirety to determine if error

[1] We note the prosecution's very persuasive argument that defendant's acquiescence to the jury instructions at trial waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Nonetheless, we will consider defendant's claim under the plain error standards applicable to unpreserved issues. See *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Here, examined in their entirety, it is apparent that defendant cannot establish the threshold requirement of an error, let alone a plain error. The trial court did not have a duty to specifically charge the jury that the prosecutor had the burden of proving that the killing was not in self-defense. *People v Hunley*, 313 Mich 688, 695; 21 NW2d 923 (1946); *People v Brown*, 34 Mich App 45, 47; 190 NW2d 701 (1971). It was sufficient that the court properly instructed the jury in accordance with the general standard of proof beyond a reasonable doubt placed upon the prosecutor and the defense of self-defense. *Id.*

Limiting our review to errors apparent from the record, we also reject defendant's claim that defense counsel's failure to request the jury instruction deprived defendant of the effective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). Because defendant has not shown instructional error, counsel's failure to request the jury instruction did not fall below an objective standard of reasonableness or cause prejudice. *Toma, supra* at 302.

That defendant was not prejudiced by the absence of the instruction is further supported by the fact that defendant's self-defense theory was directed at the lesser offense of assault with intent to do great bodily harm less than murder, which the jury was permitted to consider, rather than the conviction offense of first-degree premeditated murder. The defense theory with regard to the first-degree degree premeditated murder charge was that "Chunky" shot the victim in the head. Because defendant did not claim that he shot the victim in the head in self-defense, it is not reasonably probable that the absence of the instruction in question affected the result of the trial.

II

Defendant next argues that the prosecutor committed misconduct during closing argument by effectively testifying, based on personal knowledge, about the reason defendant went to the upper flat and the role played by "Chunky" in the incident. Because defense counsel did not object to the challenged remarks at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Examined in context, the prosecutor's remarks did not convey a message that the prosecutor was testifying based on personal knowledge.

At best, defendant has shown that the prosecutor's remarks were unsupported by the evidence. "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Schuette, supra* at 721. Even if the prosecutor's remarks could be characterized as plain error in this regard, the trial court's instructions to the jury that, "[t]he lawyers' arguments and statements are not evidence" and that "you must decide this case based only on the evidence submitted during this trial" were sufficient to cure any prejudice. Hence, this unpreserved issue affords no basis for relief. *Id.* at 720.

We further reject defendant's claim that defense counsel's failure to object to the prosecutor's remarks in his closing argument constituted ineffective assistance of counsel. Even if an objection would have been appropriate, it is not apparent from the record that counsel's

failure to object amounted to deficient performance of trial counsel. "[T]here are times when it is better not to object and to draw attention to an improper argument." *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996). Limiting our review to the record, we conclude that defendant has not overcome the presumption of sound trial strategy. *Toma, supra* at 302. Nor has defendant shown a reasonable probability that, but for counsel's alleged error, the result of the trial would have been different. *Id.* at 302-303. As previously indicated, the jury instructions were sufficient to cure any prejudice.

We also reject defendant's newly raised claim that the prosecutor engaged in misconduct during rebuttal argument. The challenged remarks constitute proper comment on the credibility of a prosecution witness. Although the prosecutor could not personally vouch for the credibility of his witnesses, he was free to argue that his witnesses were credible based on the evidence. *Schutte, supra* at 722. Defendant also challenges the prosecutor's remark that

> we don't bring into the courtroom people born last night. We bring in people, mature adults, and rely on our common sense and everyday experience.

Considered in context, it is apparent that the prosecutor was not commenting on prosecution witnesses, but rather was referring to the jury in an effort to convey that common sense could be used in arriving at its verdict. We note that the jury was later instructed by the trial court that, "[y]ou should use your common sense and general knowledge in weighing and judging the evidence, but you should not use any personal knowledge you may have about a place, a person, or event."

Because the record does not support defendant's claim that the prosecutor improperly vouched for witnesses during his rebuttal remarks, defendant's claim of prosecutorial misconduct on this ground cannot succeed. *Id.* Further, defendant's claim of ineffective assistance of counsel based on counsel's failure to object to the rebuttal remarks likewise cannot succeed because counsel need not advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); see also *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999).

III

Defendant next argues that the trial court denied defendant of his state and federal due process rights when it sustained the prosecutor's hearsay objection to defendant's testimony about what "Chunky" told defendant after the shooting.

Assuming error, we conclude the error did not affect defendant's substantial rights. The trial court's ruling to sustain the prosecutor's hearsay objection did not deprive defendant of an opportunity to present his defense that "Chunky" was the shooter, and we are satisfied that the ruling did not affect the outcome of the trial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Because defense counsel's failure to make an offer of proof did not deprive defendant of a substantial defense, that is, one that might have made a difference in the outcome of the trial, we also find without merit defendant's claim of ineffective assistance of counsel in connection with this issue. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990); *People v*

Hyland, 212 Mich App 701, 710-711; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

IV

Defendant next challenges the sufficiency of the evidence for first-degree murder. Defendant claims that the evidence was insufficient to establish premeditation and deliberation. We disagree.

Although defense counsel did not move for a directed verdict at trial, our consideration of defendant's claim is appropriate because a defendant need not take special steps to preserve a challenge to the sufficiency of the evidence. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). However, to the extent that defendant challenges the jury instructions regarding premeditation and deliberation, we decline to consider defendant's claim because it is not identified in defendant's statement of this issue. *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992); See also MCR 7.212(C)(5).

In any event, we are unpersuaded that defendant has substantively identified any erroneous jury instruction. The due process remedy for insufficient evidence is a directed verdict of acquittal. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "[T]he prosecutor need not negate every reasonable theory consistent with innocence." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The prosecutor need only prove the elements of the crime beyond a reasonable doubt in the face of whatever contradictory evidence a defendant may provide. *Id.* at 400.

"In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation characterize a thought process undisturbed by the heat of the moment. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). To premeditate is to think about beforehand. *Id.* To deliberate is to measure and evaluate major facets of a choice or problem. *Id.* "Minimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001).

Regardless of why defendant went to the upper flat, viewed in a light most favorable to the prosecutor, the evidence was sufficient to enable a rational trier of fact to find that defendant was not welcome in the upper flat, refused to leave, and ultimately shot the victim three times, with the gunshot to the victim's thigh and the two gunshots to the victim's head being separated by sufficient time for a reasonable person to subject the response to a second look. Viewed in a light most favorable to the prosecutor, the evidence did not establish the type of affray that would preclude a reasonable person from cool and orderly reflection. *Plummer*, *supra* at 300-302. The evidence was sufficient for the jury to find beyond a reasonable doubt that defendant's act of killing the victim was premeditated and deliberate.

Because the evidence was sufficient to sustain the first-degree murder conviction, we also reject defendant's claim that defense counsel's failure to move for a directed verdict constituted ineffective assistance of counsel. Defense counsel was not required to bring a frivolous motion. *Nimeth, supra* at 625.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Brian K. Zahra